

User Name: Wan Nur Addibah Binti Adnan

Date and Time: Monday, October 17, 2022 5:40:00 PM +08

Job Number: 181811116

Document (1)

1. [*Solicitors' Liability against Client and Third Party \[2013\] 3 MLJ cxxxiv*](#)

Client/Matter: -None-

Search Terms: professional negligence

Search Type: Natural Language

Narrowed by:

Content Type

MY Secondary Materials

Narrowed by

-None-

Solicitors' Liability against Client and Third Party [2013] 3 MLJ cxxxiv

Malayan Law Journal Articles

SOLICITORS' LIABILITY AGAINST CLIENT AND THIRD PARTY

Mohd Fuad Husaini¹

and

Prof Dato' Dr Hussin Ab Rahman²

The reason for writing this article can be summarised in one short comment from a practising lawyer: 'Anecdotal evidence suggests that over the last few decades the average ... solicitor ... has increasingly faced clients who are very demanding, pay as little as they can, have little respect for their advisers, and do not hesitate to blame them if anything goes wrong. One may argue as to whether or not these changes are for the better, but it must be highly likely that they have led to an increase in litigation against (solicitors)' (Evan H 2005).³ This increase in litigation and case law has generated the need for high quality comprehensive accounts of the law in this area. This article will present a comprehensive and (as far as it is practical in a complex and technical area) accessible account of the law relating to solicitors' liability. This is to offer a clearly written structured work, with a depth of analysis sufficient to meet the needs of both practitioner and academic readers. The title of this article describes precisely the aims and objective of this article, which provides a statement of the accepted principles of good conduct and practice for solicitors, as against the clients and third party.

Keywords: solicitors, **professional** liability, relationship, client, third party.

INTRODUCTION

This article is not a statement of law. However, the rules of **professional** conduct derive from both statutory and non-statutory sources. This article has tried to ensure that all necessary references to legislation and case law are included. Accordingly, where legislation or case law is relevant, references have been made in the footnotes. References have also been made in the footnotes to practice notes to which the solicitor or academic readers can refer for a full expansion of particular topics.

It is settled law in England following landmark cases that a solicitor owes a duty of care towards his client. The phrase 'duty of care' has been defined as a requirement that a person act toward others and the public with the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would use. If a person's actions do not meet this standard of care, then the acts are considered negligent, and any damage resulting may be claimed in a lawsuit for **negligence**.⁴

However, the question of the solicitor's liability to a third party in judicial methodology is still unsettled. A paradigm shift occurred in the 20th century with the development of tortious liability. The development in this area had primarily been generated by landmark cases like *Donoghue v Stevenson*⁵ and *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.⁶ While the transition and change has clarified certain areas, some structural ambiguity still remains. The remaining questions in this scope of topic will be discussed further.

ELEMENTS TO CONSTITUTE LIABILITY

For liability to be established against a solicitor, the following elements must be proved:

- (a) the existence of special relationship between the client and his solicitor;

- (b) that the party acted in reliance of his solicitor's instruction; and
- (c) that the party suffered damages accordingly and the damages must be foreseeable.

If the plaintiff can prove all these three elements, then he can sue and claim for compensation. It was held by Lord Salmon in the case of *Saif Ali v. Mitchell & Co* [1980] AC 198 that the normal rule applied by the law is that if any one holding himself out as possessing reasonable competence in his avocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care. This duty is owed to anyone he should foresee may suffer loss if the duty is breached. If in breach of that duty, he fails to exercise reasonable competence or care and as a result the person to whom the duty was owed suffers damage, he is liable to compensate that person for that damage he has suffered.

The existence of special relationship between the client and his solicitor

The concept of special relationship in this context is the fiduciary relationship which exists between the client and the solicitor. The recent developments in *Caparo Industries plc v Dickman*⁷ appear to introduce a new face in the interpretation of the doctrine of special relationship affecting professionals.

In the case of *Edwards v Lee*,⁸ a solicitor who was asked to provide a business reference on behalf of a client was held to be in special relationship with the person seeking the reference. The first plaintiff, Mr Edwards, advertised for sale of a car owned by a company in which he and his wife had an interest. The only response was a call from Mr Hawkes who offered to sell the car for Mr Edwards at an agreed price on the basis that the plaintiffs would retain title to the car and Mr Hawkes would return it if it remained unsold after 28 days. Mr Hawkes took the car away but Mr Edwards became suspicious about the arrangement when a potential purchaser, Mr Folley, rang him to tell him that he had been offered the car by Mr Hawkes at considerably less than the agreed value. Mr Hawkes then suggested that Mr Edwards contact the defendant, Mr Julian Lee, who was his solicitor, for a reference. At the time Mr Hawkes was on bail on 13 charges of dishonesty relating to the sale of cars valued at £240,000 for owners in transaction which were virtually identical to the arrangement between Mr Edwards and Mr Hawkes. The solicitor was acting for Mr Hawkes on those charges, Mr Edwards telephoned the solicitor (Mr Julian Lee) who told Mr Edwards without qualifying his responsibility in any way that he had known Mr Hawkes for three years and that Mr Hawkes had done such deals before and was very liable.

Mr Lee did not tell Mr Edwards that Mr Hawkes was then on bail on charges alleging criminal dishonesty; Mr Edwards, reassured by the reassurance given by the solicitor, took no action to repossess the car. Later Mr Hawkes sold the car and left the country while still on bail without paying the proceeds to the plaintiffs, who brought an action against the solicitor claiming damages. In the judgment, Brooke J referred to *Hedley Byrne & Co Ltd v Heller & Partners* where Lord Reid said that a duty would arise where:

It is plain that the party seeking information or advice trusted the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.

In concluding that the necessary special relationship did not exist in the case, Brooke J observed:

- (a) that the plaintiff had acted reasonably in relying on the solicitor;
- (b) that the plaintiff's loss was directly caused by the reliance on the solicitor's reference; and
- (c) that the solicitor was at all material times the plaintiff's agent.

The question that arises is on whether the solicitor will still be liable if a third party suffered damages due to his reliance with the solicitor. In the English case of *Robertson v Fleming*,⁹ Hamilton obtained a loan from a company. Fleming and others agreed to become sureties on condition that they were secured by an assignment of some property belonging to Hamilton. Robertson, a solicitor, was employed by Hamilton to draw up the assignment, but failed to notify the lessor of the property, which was required by Scottish Law. Once Hamilton becomes bankrupt, Fleming was unable to recoup his loss from the property, and he sued Robertson. The court held that a solicitor engaged by a client to effect a transaction which would obviously benefit a third party was not liable to the third party if the transaction failed to benefit him through the fault of the solicitor. As Lord Campbell LC¹⁰ stated:

I never had any doubt of the unsoundness of the doctrine ... that A employing B, a **professional** lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C, — if through the gross **negligence** or ignorance of B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw before or heard of, if the will were void for not being properly signed and attested. I am clearly of the opinion that this is not the law of Scotland or England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science.

Further, Lord Wensleydale¹¹ said:

By the law of this part of the United Kingdom, the right of action depends entirely upon the question between which the relation of principal and agent, client and attorney, subsists. He only, who by himself, or another as his agent, employs the attorney to the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that employment must be affirmed in the declaration in the suit in distinct terms ... One would suppose, a priori, that the laws of both countries would be the same, the question of being purely one of duty arising out of the contract, whatever the particular form of action would be, and it would be reasonable to hold that only contracting parties should sue each other for the breach of that contract.

Besides that, the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹² precipitated an important development in the doctrine of third party liability where there is a special relationship between the solicitor and the other party.

The question of a solicitor's duty to third party also arose, albeit indirectly in *Welburn v Mayberry*.¹³ In this case, a claim brought under the Fatal Accidents Acts was dismissed for want of prosecution. In considering the alternative remedies which were open to the dependent children for whose benefit the action had been brought, Lord Denning MR expressed the view that the solicitors owed to them a duty of care.

The client acted in reliance of his solicitor's instruction

The party alleging liability on the part of the solicitor must be able to prove that he has suffered loss because of the reliance from the solicitor. In the above cited case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,¹⁴ the court had ruled a strict interpretation besides the element of special relationship, that there must be reliance on the part of the party to constitute the **negligence**.

In *Hedley Byrne*,¹⁵ Lord Morris expressed that:

If, in a sphere in which a person is so placed that the others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, will place reliance on it, then a duty of care will arise.

In the same case, Lord Pearce approved the dissenting judgment of Denning LJ in *Candler v Crane, Christmas & Co*¹⁶ where Lord Justice Denning¹⁷ said:

Person who engaged in a calling which requires special knowledge and skill ... From very early times it has been held that they owed a duty of care to those who are closely and directly affected by their work apart altogether from any contract ...

In *Wilson and Another v Bloomfield and Another*¹⁸ there was a contract for sale of land by the first defendant (the vendor) to the plaintiffs. After the contract was made, disputes arose about the boundaries of the land. It was asserted by 'G' that part of the land which the plaintiffs had received under the conveyance did not belong to them (the plaintiffs) but to G. The plaintiffs brought an action for damages, against the vendor and also against the solicitors who had acted for him. The plaintiffs claimed as follows:

- (a) that by the answer to the enquiries before contract, the vendor (the first defendant) had misrepresented that he was not aware of any boundary disputes at any time relating to the title of the land;

Solicitors' Liability against Client and Third Party [2013] 3 MLJ cxxxiv

- (b) that the misrepresentation was renewed by the requisition on title, which was untrue;
- (c) that the vendor's solicitors (the second defendant) had completed the enquiries before contract and the requisition on title;
- (d) that the solicitors knew that the plaintiffs were placing reliance on the accuracy of the answers contained therein;
- (e) that the solicitors were aware or ought to have been aware of the dispute but had nevertheless put their names to answer the questioning of the enquiry; and
- (f) that in the premises, the solicitors owed a duty of care to the plaintiffs.

The solicitors applied to the Registrar of the Country Court to strike out the claim, on the ground that the particulars disclosed no reasonable cause of action. The registrar refused to strike out the relevant art of the particulars and Judge Stinson upheld his refusal. The judge held that there was a duty of care. The solicitors appealed.

The solicitors contended that there was no arguable case to hold them liable towards the plaintiffs. In the Court of Appeal, Megaw LJ, with whom Browne LJ and Sir Stanley Rees agreed that the proper course for the court to take when there was an application to strike out was to decide whether there was an arguable cause of action and, if there was, the court need not to go on to consider whether it was likely to succeed. Megaw LJ held that it was impossible for the court to say that this question of law was not fairly arguable. It was something which could fairly and reasonably be argued. It would not be right for the court to go into its reasons.

The question of solicitor's liability for holding out and his **negligence** in failure to inform material information has also been considered in the recent case of *Crossan v Ward Bracewell & Co.*¹⁹ Here the plaintiff was involved in an accident as the driver of a car and received a summons for reckless driving. He consulted McChrystal, a partner in the defendant firm of solicitors. Having decided that the plaintiff was not entitled to legal aid, McChrystal advised that the plaintiff should either defend himself or instruct the defendants, in which event he would have to pay £50 on account cost. The plaintiff took the former option and the defendant was never instructed.

McChrystal had failed to inform the plaintiff that his insurance company would arrange and pay for his legal representation. As a consequence, the insurers had repudiated their liability due to the failure of the plaintiff to inform them about the proceedings. Besides that, the third party claim also had to be borne by the plaintiff. The court held that:

- (a) the solicitor had held himself out as a man able to offer some advice;
- (b) the solicitor had explored the possibility of obtaining legal aid, but failed to consider the possibility that the insurer might pay off the plaintiff's litigation; and
- (c) once the solicitor had elected to hold themselves out as qualified to advise the plaintiff as to how he could obtain funds to legal costs, they owed him a duty of care.

The party suffered damages accordingly and the damages must be foreseeable

In *Cook v S*²⁰ as in *Groom v Crocker*,²¹ the issue was the correct measure of damages in an action against a solicitor for **negligence** in conducting the client's affairs. The defendant had badly advised the plaintiff in relation to divorce proceedings so that a decree was granted to her husband on his undefended petition whereas she could have cross-petitioned on the ground of his adultery. The defendant had also failed to make an application for maintenance of the child of the marriage. The plaintiff claimed, inter alia, damages for loss of earnings attributed to a breakdown in health as a result of the mishandled proceedings. The question arose whether this was a recoverable head of damages; Lawton J held that the claimed were too remote because the claim was one in contract. In so holding, he merely followed and applied *Groom v Crocker*.²²

The plaintiff appealed to the Court of Appeal. The court upheld the result which Lawton J had arrived at because on the facts, they did not regard the damage claimed as a foreseeable consequence of the **negligence**. It was too remote but not for the reason that Lawton J had given. He had arrived at the result because the action was one in contract.²³

TRANSITION OF THE PRINCIPLE **The old principle**

Before the second principle stated in landmark cases like *Donoghue v Stevenson*²⁴ and *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*²⁵ takes place, the first principle stated that a solicitor's liability to his client was based solely on breach of contract, and not on tort and the existence of the relationship is not taken into consideration.

In the case of *Groom v Crocker* which followed for the next 37 years without question, Greene MR said:²⁶

... the cause of an action is in contract, and not in tort ... The relationship of solicitor and client is a contractual one: see *Davies v Lock*²⁷ and *Bean v Wade*.²⁸ It was by virtue of that relationship that the duty arose, and it had no existence apart from that relationship.

In *Fish v Kelly*, the plaintiff consulted the employer's attorney, the defendant, on his rights to be given notice prior to the termination of employment. The defendant gave incorrect advice. The plaintiff's subsequent claim for damages was dismissed on the grounds that the plaintiff was not the defendant's client and the advice was given during a casual conversation.

The contractual-based liability was again emphasised in *Clark v Kirby-Smith*.²⁹ Plowman J followed *Groom v Crocker*³⁰ and rejected the argument that the effect of *Hedley Byrne*³¹ was to create in the case of a solicitor and his client, liability for the tort of **negligence**. Therefore, we can say the first principles laid down that the solicitor are immune from any suit commencement by the client for **negligence** occurred by the solicitor himself.

The new principle

In *Nocton v Lord Ashburton*,³² the Lord Chancellor, Lord Haldane³³ said:

... the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation, he may make liable at law in contract or even in tort, for **negligence** in breach of a duty imposed on him. In early history of the action of assumpsit this liability was indeed treated as one for tort.

The principle of exclusive contractual liability of the solicitor was disputed in *Heywood v Wellers*³⁴ when Lord Denning MR commented that *Groom v Crocker* and *Cook v S*³⁵ might have to be reconsidered.³⁶ Later the debate on solicitor's liability was reopened more vigorously by the obiter of Lord Denning MR in *Esso Petroleum Co Ltd v Mardon*³⁷ that *Groom v Crocker* was wrongly decided.

In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)*,³⁸ Oliver J (as he then was) held that a solicitor who had negligently failed to register as a land charge an option to purchase was liable to his client in the tort of **negligence**. After reviewing the authorities, Oliver J concluded that:

- (a) the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*³⁹ was inconsistent with the reasoning of *Groom v Crocker*; and
- (b) *Groom v Crocker*⁴⁰ was no longer good law.

On the relevant question, Plowman J pointed out that the old authority of *Howell v Young*⁴¹ had been recognised and applied by the House of Lords in *Cartledge v E Jopling & Sons Ltd.*⁴²

In *Whittingham v Crease & Co.*,⁴³ the defendant solicitors prepared a will for the plaintiff's father, by which most of the estate was left to the plaintiff. Owing to the defendants' **negligence**, all the benefits which were given to the plaintiff under the will were void. Atkins J held that although there was no contract between the plaintiff and the defendants, the defendants owed a duty of care to the plaintiff. The plaintiff was present when the will was executed and had an interest in the proper completion of the will. Further, the judge considered that in the light of *Donoghue v Stevenson*⁴⁴ and *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*,⁴⁵ the old cases of *Robertson v Fleming*⁴⁶ and *Fish v Kelly*⁴⁷ no longer represented the law.

APPLICATION IN MALAYSIA

Malaysian judiciary system adopts the common law based on its unique culture. The same goes to the legal profession in adopting the British system. However, the Malaysian legal profession uses a fused system whereby the advocate and solicitor may be the same person; in other words, there is no distinction between duties for both positions. In Malaysia, the barrister is referred to as advocate and solicitor. Both advocate and solicitor may have to face the same charge or offence for any **professional negligence** committed subject to the relevant facts and circumstances.

According to the Legal Profession Act 1976, the 'advocate and solicitor' is defined as a person who is admitted and enrolled under the Act⁴⁸ For a 'client', it may be described as a person who retains or employs an advocate and solicitor and is a person who is responsible or liable to pay a solicitor's cost. It further explained that the advocate and solicitor may enter into an agreement with the client on matters of remuneration⁴⁹ Moreover, such agreement which states any exemption clause that the advocate and solicitor will not be responsible or liable for **negligence** will be rendered void.

Therefore, the relationship between the advocate and solicitor and the client in Malaysia is a contractual relationship. It signifies that the advocate and solicitor appointed by the client are responsible for duties entrusted by the client with due care and skill. Failure on the part of the solicitor and advocate to meet with the standard expected by the client may entitle an action to be taken against the advocate and solicitor.⁵⁰

In the case of *Lim Soh Wah v Wong Sin Chong & Anor (and another appeal)*,⁵¹ His Lordship Gopal Sri Ram JCA held that:

Our law has always been differed from English law. Advocates here have never enjoyed immunity from suits from **negligence**.

In Malaysia, the client may initiate action against the appointed advocate and solicitor where **negligence** has occurred due to the failure of the advocate and solicitor to fulfil their duties with due care and skill. This principle is different from English law, as seen in the case of *Miranda v Khoo Yew Boon*,⁵² where the Federal Court stated that an advocate and solicitor is under the contractual duty to use skill and care. If **negligence** occurs, the advocate and solicitor can definitely be sued.

In the case of *Neogh Soo Oh v G Rethinasamy*,⁵³ the solicitor had failed to exercise his duty to use reasonable care and skill in taking action and advice when he did not conduct a land search and failed to inform his client that the land he wished to purchase was gazetted for compulsory acquisition. Therefore, the solicitor was liable for **negligence** for breach of duty for a client who relied on his knowledge and skill.

CONCLUSION

Despite the reality that the Malaysian legal profession is derived from English law, our legal practitioner never enjoyed the immunity from suits for **professional negligence**. When it can be proven that relationship between the solicitor and the client is indeed fiduciary and contractual, the solicitor may be liable and shall compensate the client for any **negligence** for breach of duty of care and skill, which caused the client to suffer losses.

As alluded to earlier, the legal profession has, since time immemorial, been regarded as a profession of highly qualified people and is therefore expected by end users of the services to have the lowest level of **negligence** in their discharge of duties. With the fact of being human, it will be unavoidable for an individual to occasion mishaps from time to time. While we await legislations to intervene in the area of expanding liability of lawyers to their clients and third parties, the safest means of ensuring that a lawyer is not liable in **negligence**, is to exhibit the highest level of proficiency and dignity in the discharge of the duties.

¹

Dean, Faculty of Law and International Relations, University Sultan Zainal Abidin and former practicing advocate and solicitor of the High Court of Malaya.

² Professor of Law, Faculty of Law and International Relations, University Sultan Zainal Abidin.

Solicitors' Liability against Client and Third Party [2013] 3 MLJ cxxxiv

- ³ See Evans H, The Rise and Fall of **Professional Negligence**: One Practitioner's View, **Professional Negligence**, Vol 21, No 1, 2005, pp 27–38, 31.
- ⁴ See <http://dictionary.law.com/Default.aspx?selected=599>
- ⁵ [1932] AC 562.
- ⁶ [1964] AC 465.
- ⁷ [1990] 2 AC 605.
- ⁸ [1991] New LJ 1517.
- ⁹ (1861) 4 Macq 167 (HL).
- ¹⁰ *Ibid*, p 177; Lord Cranworth expressed similar views at pp 184–185.
- ¹¹ *Ibid*, at p 199.
- ¹² [1963] 2 All ER 575; [1964] AC 465.
- ¹³ [1971] 115 SJ 468 (CA).
- ¹⁴ [1963] 2 All ER 575; [1964] AC 465.
- ¹⁵ *Ibid*.
- ¹⁶ [1951] 1 All ER 426.
- ¹⁷ *Ibid* at p 533.
- ¹⁸ [1979] SJ 860.
- ¹⁹ (1989) 5 PN 103.
- ²⁰ [1967] 1 All ER 299.
- ²¹ [1939] 1 KB 194.
- ²² *Ibid*.
- ²³ See *Midland Bank Trust Co. Ltd. v. Hett, Stubs & Kemps*, [1978] 3 All ER 571 at p 602, per Oliver J.
- ²⁴ [1932] AC 562.
- ²⁵ [1964] AC 465.
- ²⁶ [1939] 1 KB 194 at p 205.
- ²⁷ [1884] 3 LTOS 125.
- ²⁸ (1885) 2 TLR 157.
- ²⁹ [1964] 2 All ER 835; [1964] Ch. 506.
- ³⁰ [1938] 2 All ER 394.
- ³¹ [1963] 2 All ER 575; [1964] AC 465.
- ³² [1914] AC 932.
- ³³ *Ibid*.
- ³⁴ [1976] 1 All ER 300.
- ³⁵ [1967] 1 All ER 299.
- ³⁶ [1976] 1 All ER 300 at p 306.
- ³⁷ [1976] QB 801 at p 819.
- ³⁸ [1979] Ch 384.
- ³⁹ [1963] 2 All ER 575; [1964] AC 465.
- ⁴⁰ *Ibid*.
- ⁴¹ [1924–34] All ER Rep 377; (1826) 5 B & C 259.
- ⁴² [1963] 1 All ER 341.
- ⁴³ (1979) 88 DLR (3d) 353 (British Columbia Supreme Court).
- ⁴⁴ [1932] AC 562.

⁴⁵ [1963] 2 All ER 575; [1964] AC 465.

⁴⁶ (1861) 4 Macq 167.

⁴⁷ (1864) 17 CB (NS) 194.

⁴⁸ [Section 3](#) of the [Legal Profession Act 1976](#).

⁴⁹ [Section 114](#) of [Legal Profession Act 1976](#).

⁵⁰ As opposed to the principle in case of *Rondel v Worsley* where the court held that a barrister cannot be suit.

⁵¹ [2001] 2 AMR 2001.

⁵² [\[1968\] 1 MLJ 161](#).

⁵³ [\[1984\] 1 MLJ 126](#).

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